

STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 7725

Petition of Telephone Operating Company of Vermont)
LLC, d/b/a FairPoint Communications, for Amendment)
to the Vermont Performance Assurance Plan and for)
Approval of Alternative Use of Mode of Entry ("MOE"))
Payments)

Order entered: 5/12/2011

ORDER RE: INTERVENTION

I. COMCAST MOTION TO INTERVENE

Background

Telephone Operating Company of Vermont LLC ("FairPoint") is subject to the Performance Assurance Plan ("PAP") which regulates its provision of wholesale services to competitive local exchange carriers and imposes penalties for failure to meet the criteria in the PAP. Penalty amounts associated with what the PAP defines as Mode of Entry ("MOE") standards are required to be paid to the Vermont Universal Service Fund ("VUSF").¹ In this proceeding, the Vermont Public Service Board ("Board") is considering a request from FairPoint to use over \$4 million of MOE penalty payments for expansion of broadband services to areas that FairPoint presently does not offer such service, rather than paying the amounts to the VUSF as provided in the PAP.

On April 15, 2011, Comcast Phone of Vermont, LLC ("Comcast") filed a Motion to Intervene in this proceeding. FairPoint opposes Comcast's motion. The Department of Public Service ("Department") joins FairPoint's opposition. In this Order, the Board grants Comcast's Motion.

1. Other PAP payments go to affected competitors.

Positions of the Parties

Comcast states that it has a substantial interest in this proceeding by virtue of its status as a contributor to the VUSF. According to Comcast, the result of this docket will affect how the VUSF contribution factor will be set in the future, and will therefore affect Comcast. Comcast also contends that it has no other means to protect its interests and that no other party can adequately represent those interests.

FairPoint asserts that Comcast fails to identify how this proceeding will impact the setting of the VUSF contribution factor. Specifically, FairPoint argues that Comcast has not specifically stated the nature of its interest because it has not identified the manner in which it would be affected by the diversion of Performance Assurance Plan ("PAP") Mode of Entry ("MOE") payments from the VUSF to broadband deployment. Moreover, FairPoint contends that Comcast has not identified any cause and effect relationship between the VUSF contribution rate and MOE payments. FairPoint also maintains that even if there were such a direct relationship, it would still not constitute an interest since the MOE payments represent "a windfall to the VUSF as to which Comcast has no entitlement." Finally, FairPoint argues that Comcast has not shown that it has no other means to protect its interest, such as participation in the annual VUSF contribution factor proceeding.

The Department supports FairPoint's arguments.

In reply comments, Comcast states that the amount FairPoint proposes to divert from the VUSF "is only slightly less than VUSF's projected cash receipts from carriers for the period September 1, 2010 through August 31, 2011." Thus, Comcast asserts that if the funds are not diverted, carriers' cash contributions to the VUSF for the next fiscal year would be almost totally displaced. Comcast also argues that the VUSF payments from FairPoint are not a "windfall" but rather a specific commitment (in the PAP), the diversion of which adversely affects Comcast. Finally, Comcast disagrees with FairPoint's contention that the annual VUSF contribution factor proceeding provides an adequate means to protect its interest since this proceeding, not the VUSF one, will determine the disposition of the MOE payments. Finally, Comcast contends that it can provide assistance to the Board in this proceeding, by identifying areas in which it already provides some service.

Discussion

Intervention in this proceeding is governed by Board Rule 2.209(B), which states as follows:

Permissive intervention. Upon timely application, a person may, in the discretion of the Board, be permitted to intervene in any proceeding when the applicant demonstrates a substantial interest which may be affected by the outcome of the proceeding. In exercising its discretion in this paragraph, the Board shall consider (1) whether the applicant's interest will be adequately protected by other parties; (2) whether alternative means exist by which the applicant's interest can be protected; and (3) whether intervention will unduly delay the proceeding or prejudice the interests of existing parties or of the public.

If Comcast actually made payments into the VUSF, there would be little question that it had a substantial interest in the outcome of this proceeding. Under the PAP, the MOE penalty payments must go to the VUSF. The annual contribution rate to the VUSF which each carrier must pay is based upon the amount of funds necessary to meet the obligations of the VUSF, any money in the VUSF would serve to reduce the next year's contribution rate. However, under Vermont law, Comcast itself does not actually pay into the VUSF; instead, the statute specifies that the charge is imposed on the person purchasing the service, even though Comcast may collect and remit these payments. Specifically, 30 V.S.A. § 7521 states:

A universal service charge is imposed on all retail telecommunications service provided to a Vermont address. Where the location of a service and the location receiving the bill differ, the location of the service shall be used to determine whether the charge applies. The charge is imposed on the person purchasing the service, but shall be collected by the telecommunications provider. Each telecommunications service provider shall include in its tariffs filed at the public service board a description of its billing procedures for the universal service fund charge.

Thus, the VUSF contribution rate does not directly affect Comcast in the manner that both Comcast and FairPoint discuss in their filings.

Nonetheless, the VUSF contribution rate may indirectly affect Comcast. The telecommunications marketplace now includes competitors that may not pay into the VUSF or may contribute at a lower rate than other carriers. For example, certain carriers such as Magic Jack and Skype do not presently contribute. A reduction in the VUSF contribution rate from end users, which would occur if FairPoint's petition is not granted, could have an effect on the

competitiveness of Comcast vis-a-vis such service providers. Comcast thus has an interest in the outcome of this proceeding sufficient to support permissive intervention.

We are also persuaded that Comcast can provide useful input into this investigation. As Comcast argues in its reply comments, it has knowledge of the current areas in which Comcast offers service (and presumably has information regarding areas to which Comcast may extend service). The value of diverting the MOE payments to broadband deployment cited by FairPoint is to extend into presently unserved areas. In assessing the reasonableness of FairPoint's proposal, it may, therefore, be useful to have information on the extent of coverage of the predominant cable provider in the state. Moreover, it is possible that FairPoint could use portions of the diverted funds to expand broadband service to areas now served (at least in part) by Comcast. Comcast thus has a substantial interest as a potential competitor.

We conclude that Comcast has met the standard for permissive intervention and grant its motion.

II. MOTION TO WAIVE RULE 2.201(C)

On April 11, 2011, Telephone Operating Company of Vermont LLC, d/b/a FairPoint Communications ("FairPoint"), filed a motion requesting a waiver of Public Service Board Rule 2.201(C) to allow Patrick C. McHugh, Esq., an attorney for FairPoint licensed in New Hampshire and Massachusetts, to appear on behalf of FairPoint. No party objected to the motion and it is granted.

SO ORDERED.

Dated at Montpelier, Vermont, this 12th day of May, 2011.

<u>s/ James Volz</u>)	
)	PUBLIC SERVICE
)	
<u>s/ David C. Coen</u>)	BOARD
)	
)	OF VERMONT
<u>s/ John D. Burke</u>)	

OFFICE OF THE CLERK

FILED: May 12, 2011

ATTEST: s/ Susan M. Hudson
Clerk of the Board

NOTICE TO READERS: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Board (by e-mail, telephone, or in writing) of any apparent errors, in order that any necessary corrections may be made. (E-mail address: psb.clerk@state.vt.us)